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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Clarence Wayne Dixon,
Plaintiff,

-v-

Arizona Department
Corrections, Rehabilitation
Reentry (ADCRR), et al.,
Defendants.

of
&

CV 22-604-PHX-DJH (JFM)

**DEFENDANTS' RESPONSE TO
EMERGENCY MOTION FOR
TEMPORARY RESTRAINING
ORDER OR PRELIMINARY
INJUNCTION AND
MEMORANDUM IN SUPPORT**

Defendants Arizona Department of Corrections, Rehabilitation & Reentry (ADCRR), David Shinn, Travis Scott, and James Kimble, respond in opposition to Plaintiff's Emergency Motion for Temporary Restraining Order or Preliminary Injunction. Dkt. # 7. Plaintiff's motion should be dismissed because ADCRR is now providing the relief Plaintiff seeks.

A. Factual and procedural background.

On April 5, 2022, the Arizona Supreme Court issued a warrant of execution for Plaintiff, with a scheduled execution date of May 11, 2022. On April 13, 2022, Plaintiff filed a five-count Complaint asserting violations of the Eighth Amendment; the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et seq.; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, based on ADCRR's alleged failure to provide him with a blind aide while he has been

1 moved to a single-person cell and placed on continuous observation for the 35 days
 2 preceding his execution pursuant to ADCRR’s Department Order 710, ¶¶ 7.1.5.1,
 3 7.1.5.2. Department Order 710, available at
 4 https://corrections.az.gov/sites/default/files/policies/700/0710_031021.pdf; *see*
 5 *also* Dkt. # 1. Plaintiff also filed an Emergency Motion for Temporary Restraining
 6 Order or Preliminary Injunction. Dkt. # 4.

7 Two days later, on April 15, 2022, counsel for ADCRR informed Plaintiff’s
 8 counsel via email that, beginning on Saturday, April 16, 2022, ADCRR has
 9 assigned a CO III to act as Plaintiff’s blind aide. Exhibit 1. ADCRR additionally
 10 agreed that the CO III’s work with Plaintiff in this capacity does not result in any
 11 waiver of attorney-client or work product privilege on Plaintiff’s part, and that any
 12 information subject to these privileges revealed to the blind aide remain
 13 confidential and may not be disclosed. *Id.* ADCRR has thus provided the relief
 14 Plaintiff seeks by granting him access to a blind aide during the special housing
 15 accommodations required by D.O. 710 for the 35 days preceding his execution.

16 **B. Temporary Restraining Order (TRO)/Preliminary Injunction** 17 **Standard.**

18 The analysis for granting a TRO is “substantially identical” to that for a
 19 preliminary injunction. *Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co.,*
 20 *Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001); *Cochran v. Rollins*, No. CV07-1714-
 21 PHX-MH MJRI, 2008 WL 3891578, at *1 (D. Ariz. Aug. 20, 2008). And
 22 temporary restraining order “should be restricted to serving [its] underlying
 23 purpose of preserving the status quo and preventing irreparable harm just so long
 24 as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v.*
 25 *Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).

26 “A preliminary injunction is an ‘extraordinary and drastic remedy, one that
 27 should not be granted unless the movant, *by a clear showing*, carries the burden of
 28 persuasion.’” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting

1 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curium)); *see also Winter v.*
 2 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted) (“[a]
 3 preliminary injunction is an extraordinary remedy never awarded as of right.”).
 4 “The purpose of a preliminary injunction is merely to preserve the relative
 5 positions of the parties until a trial on the merits can be held.” *Univ. of Texas v.*
 6 *Camenisch*, 451 U.S. 390, 395 (1981).

7 A plaintiff seeking a preliminary injunction must establish that (1) he is
 8 likely to succeed on the merits, (2) he is likely to suffer irreparable harm without
 9 an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is
 10 in the public interest. *Winter*, 555 U.S. at 20. “Speculative injury does not
 11 constitute irreparable injury.” *Goldie’s Bookstore, Inc. v. Superior Court of State*
 12 *of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (citation omitted). “But if a plaintiff can
 13 only show that there are ‘serious questions going to the merits’—a lesser showing
 14 than likelihood of success on the merits—then a preliminary injunction may still
 15 issue if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other
 16 two *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709
 17 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*,
 18 632 F.3d 1127, 1135 (9th Cir. 2011)). Under this serious questions variant of the
 19 *Winter* test, “[t]he elements . . . must be balanced, so that a stronger showing of
 20 one element may offset a weaker showing of another.” *Lopez*, 680 F.3d at 1072.

21 The movant has the burden of proof on each element of the test, regardless
 22 of the standard which is applied. *Envtl. Council of Sacramento v. Slater*, 184 F.
 23 Supp. 2d 1016, 1027 (E.D. Cal. 2000). Moreover, there is a heightened burden
 24 where a plaintiff seeks a mandatory preliminary injunction, which should not be
 25 granted “unless the facts and law clearly favor the plaintiff.” *Comm. of Cent. Am.*
 26 *Refugees v. I.N.S.*, 795 F.2d 1434, 1441 (9th Cir. 1986), *amended* 807 F.2d 769
 27 (9th Cir. 1987) (citation omitted); *see Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399,
 28

1 1403 (9th Cir. 1993) (“‘mandatory preliminary relief’ is subject to heightened
2 scrutiny”).

3 In addition, the Prison Litigation Reform Act [“PLRA”] imposes additional
4 requirements on prisoner litigants who seek preliminary injunction relief against
5 prison officials. The PLRA provides that:

6 [i]n any civil action with respect to prison conditions, to the extent
7 otherwise authorized by law, the court may enter a temporary
8 restraining order or an order for preliminary injunctive relief.
9 Preliminary injunctive relief must be narrowly drawn, extend no
further than necessary to correct the harm the court finds requires
preliminary relief, and be the least intrusive means necessary to
correct that harm.

10 18 U.S.C. § 3626(a)(2). Thus, § 3626(a)(2) limits the court’s power to grant
11 preliminary injunctive relief to inmates; “no longer may courts grant or approve
12 relief that binds prison administrators to do more than the constitutional
13 minimum.” *Gilmore v. People of the State of Cal.*, 220 F.3d 987, 999 (9th Cir.
14 2000).

15 **C. Plaintiff’s request for a TRO or preliminary injunction should be**
16 **denied as moot.**

17 Plaintiff’s request for injunctive relief should be denied as moot because
18 ADCRR has agreed to assign a CO III to act as Dixon’s blind aide, as he has
19 requested. Although a private defendant’s voluntary cessation of challenged
20 conduct does not necessarily render a case moot, the courts “‘treat the voluntary
21 cessation of challenged conduct by government officials ‘with more solicitude ...
22 than similar actions by private parties.’” *Bd. of Trustees of Glazing Health and*
23 *Welfare Trust v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (quoting *Am.*
24 *Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010)); *see*
25 *also Am. Cargo Transp. Inc.*, 625 F.3d at 1180 (“[W]e presume the government is
26 acting in good faith.”). Here, ADCRR is currently providing and will continue to
27 provide Plaintiff with a blind aide while under his current special housing
28 accommodations and has also agreed with Plaintiff that any work-product or

1 attorney-client privileged information revealed to the blind aide remains
2 privileged, confidential, and non-disclosable. His request for a temporary
3 restraining order or preliminary injunction requiring ADCRR to provide this same
4 accommodation is thus moot.

5 **D. Conclusions.**

6 Because ADCRR is now providing Plaintiff with the relief he seeks, his
7 motion for a temporary restraining order or preliminary injunction should be
8 denied.

9 Respectfully submitted this 18th day of April, 2022.

10 Mark Brnovich
11 Attorney General

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13 s/ Jeffrey L. Sparks
14 Assistant Attorney General

15 Attorneys for Respondents
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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2022, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and served the attached document using ECF on the following registered participants of the ECF System:

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